APPENDIX

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Supreme Court of the United States

October Term, ~~1968~~ 1969

No. ~~922~~ 42

HOWARD ROSS and BERNARD ROSS, as Trustees for Lena Rosenbaum,

Petitioners,

—v.—

ROBERT A. BERNHARD, *et al.*,

Respondents.

On writ of certiorari to the United States Court of Appeals for the Second Circuit

Petition for certiorari filed January 29, 1969
Certiorari granted March 24, 1969

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Docket Entries

(Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

APPEAL FROM SOUTHERN DISTRICT

CASE NO. 32118

HOWARD ROSS and BERNARD ROSS, as Trustees for Lena Rosenbaum,

Plaintiffs-Appellees,

v.

ROBERT A. BERNHARD, *et al.*,

Defendants-Appellants.

E. C. McLean

TRANSFERRED FROM MR 1734—CAL. #6

65 Civ. 665

Attorneys for appellee

ROSENTHAL & GURKIN
19 West 44th Street
New York, N. Y. 10038

Attorneys for appellant

SULLIVAN & CROMWELL
(Clark, Francis, Kircher, Puckett, Reavis, Thornton and Wilde)
48 Wall St.,
N. Y., N. Y. 10006

SIMPSON THACHER & BARTLETT
(Robert A. Bernard, et al.)
120 Broadway
N. Y. N. Y. 10005

WALSH & FRISCH
(The Lehman Corp.)
250 Park Ave.
New York, N. Y. 10017

Docket Entries

DATE	FILINGS—PROCEEDINGS
12-18-67	Filed motion for leave to appeal under Rule 1292(b)
12-21-67	Filed order adjourning motion for leave to appeal to 1-3-68; respondents to answer said petition by 1-3-68
1-3-68	Filed memorandum in opposition to motion for leave to appeal
1-11-68	Filed order granting motion for leave to appeal (Lehman Corp., et al.)
2-23-68	Filed record (original papers of District Court)
3-25-68	Filed order extending time to file appellants brief & appendix to 4-16-68
4-16-68	Filed brief & appendix, appellants
5-6-68	Filed brief, appellees
5-21-68	Filed reply brief, appellants
9-5-68	Argument heard (by: Lumbard, Chj., Smith & Anderson, CJJ)
11-1-68	Judgment Reversed and Action Remanded, Lumbard, Ch J (mailed notices) (4)
11-1-68	Dissenting in separate opinion, Smith, CJ

Docket Entries

DATE	FILINGS—PROCEEDINGS
11-1-68	Filed judgment
11-22-68	Filed itemized and verified bill of costs with proof of service
11-26-68	Filed statement of costs
11-26-68	Issued Mandate (opinion, judgment & statement of costs)
1-24-69	Certified proceedings and original record for Rosenthal & Gurkin
1-28-69	Filed receipt by Supreme Court of certified record
2-4-69	Filed notice of filing of petition for writ of certiorari
3-28-69	Filed certified copy of order of Supreme Court granting petition for writ of certiorari

A4

Docket Entries

(District Court)

CIVIL DOCKET 65 CIV 665

UNITED STATES DISTRICT COURT

Jury demand date: 3-4-65 by pltff.

HOWARD ROSS and BERNARD ROSS, as Trustee for LENA ROSENBAUM,

vs

ROBERT A. BERNHARD	ERNEST R. BREECH
HOWARD L. CLARK	LUCIUS D. CLAY
PAUL L. DAVIES	FREDERICK L. EHRMAN
CLARENCE FRANCIS	MONROE C. GUTMAN
JAMES K. HART	JAMES M. HESTER
DONALD P. KIRCHER	ROBERT LEHMAN
PAUL E. MANHEIM	PAUL M. MAZUR
THOMAS A. MORGAN	ALVIN W. PEARSON
T. S. PETERSEN	B. EARL PUCKETT
JOHN W. REAVIS	CHARLES B. THORNTON
FRAZAR B. WILDE; and	
ROBERT LEHMAN	MONROE C. GUTMAN
PAUL M. MAZUR	JOSEPH A. THOMAS
FREDERICK L. EHRMAN	H. J. SZOLD
PAUL E. MANHEIM	HERMAN M. KAHN
MORRIS NATELSON	EDWIN L. KENNEDY
FRANK J. MANHEIM	ALLAN B. HUNTER
MARCEL A. PALMARO	WILLIAM H. OSBORNE, JR.
ARTHUR D. SCHULTE	ROBERT A. BERNHARD

ALVIN W. PEARSON, individually and as partners doing business under the firm name and style of LEHMAN BROTHERS; and THE LEHMAN CORPORATION

For plaintiff:

ROSENTHAL & GURKIN
19 West 44 St., NYC

For defendant:

SULLIVAN & CROMWELL (*Howard L. Clark*)
48 Wall St., NYC

WALSH & FRISCH (*Lehman Corp.*)
250 Park Ave. NY NY

SIMPSON THACHER & BARTLETT
(*defts. Robert A. Bernhard, et al.*)
120 Broadway, NYC

Docket Entries

DATE	PROCEEDINGS
(B)	
Mar. 4-65	Filed complaint and issued summons.
Mar. 25-65	Filed stip. & order extending time for deft. Lehman Corp. to answer to 5-3-65—Cannella, J.
Mar. 25-65	Filed stip. & order extending time for deft. Howard L. Clark to answer to 5-3-65—Cannella, J.
Mar. 31-65	Filed stip. & order extending time of defts. Robert A. Bernhard, et al. to answer to 5-3-65—Herlands, J.
Apr. 13-65	Filed summons & return, served Lehman Corp. 3-11-65; Lehman Bros. 3-11-65; Robert Lehman 3-16-65; Paul Mazur 3-16-65; & Howard L. Clark 3-10-65
Apr. 29-65	Filed stip. & order extending time for deft. Howard L. Clark to answer to 6-2-65—Cashin, J.
May 4-65	Filed stip. & order extending time of defts. Robert A. Bernhard, et al. to answer to 6-2-65—Feinberg, J.
May 4-65	Filed stip. & order extending time of deft. Lehman Corp. to answer to 6-2-65—Feinberg, J.

Docket Entries

DATE	PROCEEDINGS
June 3-65	Filed stip. & order extending time for deft. Lehman Corp. to answer to 7-8-65—McGohey, J.
June 3-65	Filed stip. & order extending time for deft. Howard L. Clark to answer to 7-8-65—McGohey, J.
June 7-65	Filed stip. & order extending time for defts. Robert A. Bernhard, et al. to answer to 7-8-65—Palmieri, J.
July 8-65	Filed Answer to deft. Howard L. Clark
July 13-65	Filed Answer of deft. The Lehman Corp.
July 15-65	Filed stip. & order extending time of deft. Lehman Brothers to answer etc. tp 7-15-65—Bonsal, J.
July 20-65	Filed Answer of defts. Robert A. Bernhard, Lucius D. Clay, Frederick L. Ehrman, Monroe C. Gutman, Robert Lehman, Paul E. Manheim, Paul M. Mazur, Alvin W. Pearson, Joseph A. Thomas, H. J. Szold, Herman H. Kahn, Morris Natelson, Edwin L. Kennedy, Frank J. Manheim, Allan B. Hunter, Marcel A. Palmaro, William H. Osborne, Jr. & Arthur D. Schulte individually and as partners doing business as Lehman Bros.

Docket Entries

DATE	PROCEEDINGS
Apr. 5-66	Filed deft's interrogs.
Apr. 14-66	Filed pltff's notice to take deposition.
Apr. 13-66	Issued additional summons.
Apr. 18-66	Filed deft Lehman's ans. to interrogs.
Apr. 15-66	Filed stip. & order extending deft. Lehman's time to ans. etc. to interrogs. to 5-2-66—Murphy, J.
Apr. 28-66	Filed summons & return—served F. Wilde on 4-21-66 in Dist. of Conn.
May 3-66	Filed stip. & order adjourning deposition of R. Lehman to 5-18-66 & right to object to that deposition is reserved—McLean, J.
May 9-66	Filed defts interrogs.
May 10-66	Filed Answer of deft. F. Wilde.
May 23-66	Filed stip. & order that deposition of deft. Robert Lehman be amended by substituting the name of deft. Alvin W. Pearson and said deposition be adjourned to 6-17-66—Wyatt, J.
June 2-66	Filed pltff's ans. to interrogs.
June 20-66	Filed order—pltff has 90 days to file note of issue etc.—McGohey, J.

Docket Entries

DATE	PROCEEDINGS
June 20-26	Call for review—G.R. 2 days before—McGohey, J.—90 D/C
June 23-66	Filed stip. & order adjourning deposition of Alvin Pearson to 7-15-66—Tenney, J.
Aug. 2-66	Filed stip. & order adjourning deposition of A. Pearson to 8-5-66—Herlands, J.
Sept. 12-66	Filed pltff's affdvt. & notice of motion—Discovery & inspection—Ret. 9-20-66
Sept. 20-66	Filed affdvt., consent & order extending ptlff's time to file note of issue to 3-19-67—Sugarman, J.
Sept. 21-66	Filed memo endorsed on motion filed 9-12-66—Motion consented to. Settle order Bryan, J.
Oct. 6-66	Filed pltff's affdvt. & order—that pltff's motion for discovery inspection is granted etc. as indicated—Bryan, J. mailed notice
(C)	
Oct. 27-66	Filed pltff's copy of order with notice of entry
Nov. 4-66	Filed pltff's notice of taking deposition.
Nov. 15-66	Filed deft. (Lehman et al.) interrogs.
Dec. 30-66	Filed pltff's interrogs.

Docket Entries

DATE	PROCEEDINGS
Jan. 18-67	Filed stip & order extending time of defts to object etc. (re: interrogs. to 1-17-67 that defts answer interrogs. extended to 1-23-67—Edelstein, J.
Jan. 19-67	Filed deft's R. A. Bernhard et al notice of motion—objections to pltff's interrogs.—Ret 1-26-67
Jan. 19-67	Filed deft's (R. A. Bernhard et al) memorandum in support of their motion.
Jan. 24-67	Filed deft (Clark & Wilde) answers to written interrogs.
Jan. 25-67	Filed stipulation—adjourning objections of deft. to 2-2-67
Jan. 27-67	Filed pltff's affdvt in opposition to deft's objections to pltff's interrog.
Jan. 27-67	Filed memorandum in opposition to defts' objections to pltff's interrogs.
Feb. 23-67	Filed pltff's answers to defts' interrogs.
Feb. 27-67	Issued 6 additional summons
Feb. 27-67	Filed consent & order—Motion for substitution—of Howard Ross & Bernard Ross (the "Petitioners") substituting them as Trustees for Lena Rosenbaum as pltff's in place of

Docket Entries

DATE	PROCEEDINGS
	Frank Ross—former trustee—So ordered—Motley, J.
Feb. 28-67	Filed pltff's interrogs
Feb. 28-67	Filed pltff's notice of taking deposition
Mar. 1-67	Filed pltff's notice of taking deposition of Alvin W. Pearson
Mar. 1-67	Filed pltff's notice of taking deposition of Howard L. Clark
Mar. 1-67	Filed deposition of Frazar B. Wilde. Mailed notice.
Feb. 2-67	Filed affdvt. of deft. Lawrence M. McKenna (filed in Court)
Mar. 2-67	Filed pltff's memorandum in response to deft's reply memorandum
Mar. 2-67	Filed deft's reply memorandum
Mar. 2-67	Filed memorandum endorsed on motion filed on 1-19-67—We find no showing that answers to these interrogs. will be burdensome—and no reason appears why answers should be delayed until defts' interrogs have been answered—Objections are overruled—So ordered—Ryan, J. Mailed notice.

Docket Entries

DATE	PROCEEDINGS
Mar. 9-67	Filed pltff's affdvt. & notice of motion—File supplemental complaint—Ret. 3-21-67
Mar. 21-67	Filed additional summons & ret—Served John W. Reavis personally on 3-3-67 at Cleveland ND of Ohio
Mar. 21-67	Filed pltff's affdvt. & notice of motion extend time to file N/I—Ret. 3-17-67
Mar. 21-67	Filed memo endorsed on motion filed this date—Sufficient reason therefor approving this application it granted—So ordered—Sugarman, J. m/n
Mar. 22-67	Filed memo endorsed on motion filed 3-9-67—Motion consented to—Settle order—Bryan, J.
Mar. 29-67	Filed order & notice of settlement—that pltff's motion is granted and that pltff. be granted leave to file a supplemental complaint—Bryan, J. m/n
Apr. 7-67	Filed copy of order with notice of entry.
May 9-67	Filed stipulation between parties—that pltffs' supplemental complaint is deemed to have been served as of the date of this stipulation etc.
May 11-67	Filed stip. & order extending time of defts. Bernhard, et al. to answer interrogs. to 5-12-

DATE	PROCEEDINGS
	67—deposition of Alvin W. Pearson is adjourned to 5-19-67—Wyatt, J.
May 17-67	Filed defts' (Bernard, et al.) answers to interrogs.
May 26-67	Filed pltff's affdvt. & notice of motion to amend complaint—ret. 6-6-67
June 2-67	Filed stip. & order—in lieu of answering pltff's 1st amended complaint—deft. P. L. Davies will answer pltff's supplemental complaint—time of defts Bernhard, et al. to answer pltff's supplemental complaint be extended from 3-29-67 to and including the tenth day after entry of an order disposing of pltffs' pending motion for leave to file 2nd amended complaint—So ordered—Tyler, J.
June 5-67	Filed stipulation between parties adjourning pltffs' motion for leave to serve amended complaint to 6-13-67
(D)	
June 16-67	Filed pltff's affdt. & notice of motion—produce & inspect (deft. Lehman) Ret. 6-22-67
June 16-67	Filed pltff's affdvt. & notice of motion—produce & inspect (various defts) Ret. 6-22-67
June 19-67	Filed affdt. of Cornelius B. Prior, Jr. in opposition to pltff's motion

Docket Entries

DATE	PROCEEDINGS
June 19-67	Filed memorandum in opposition to pltff's motion
June 21-67	Filed affdvt. of Theodore J. Kircher in opposition to pltffs' motion
June 21-67	Filed deft's (Bernard, et al.) memorandum in opposition
June 21-67	Filed affdvt. of E. Roger Frisch in opposition
June 21-67	Filed affdvt., stip. & order extending pltffs' time to file note of issue to 6-26-67—Sugarman, J.
June 22-67	Filed affdvt. of Lawrence M. McKenna in opposition
June 22-67	Filed memo endorsed on motion to amend complaint—filed 5-26-67—Motion granted. Settle order as agreed upon by counsel following argument—Bonsal, J.
June 23-67	Filed pltff's requests for admissions.
June 26-67	Filed pltff's memorandum in support of discovery
June 27-67	Filed stip. & order extending time to file note of issue to 6-30-67—Sugarman, Ch.J.
June 30-67	Filed pltff's Note of Issue & Statement of readiness.

Docket Entries

DATE	PROCEEDINGS
June 30-67	Filed memo endorsed—motion for discovery withdrawn—So ordered—Bryan, J.
June 29-67	Filed in court pltff's 9F affdvt.
June 30-67	Filed memo endorsed—motion to produce denied—following argument—So Ordered—Bryan, J. M/N
July 6-67	Filed consent & order—that pltff's are granted leave to file and serve a 2nd amended complaint—defts are excused from answering any previous complaint—that the right of defts to interpose any defense to aforesaid 2nd amended complaint including without limitation—defense of the statute of limitations be and is reserved to them—that the right of defts to assert that any claim asserted in 2nd amended complaint did not arise out of any conduct—transaction or occurrence set forth etc. in the original—that amendment permitted by this order does not relate back to date of the original etc.—that defts may conduct discovery proceedings with respect to newly interposed claims—concerning interpositioning etc. contained in proposed 2nd amended complaint during 90 days succeeding date of this order irrespective of filing by plff. of note of issue on or before 6-30-67—Bonsal, J.

Docket Entries

DATE	PROCEEDINGS
July 13-67	Filed 2nd amended complaint
Aug. 8-67	Filed stip. & order extending time for defts to move or answer to amended complaint to 8-10-67—Motley, J.
Aug. 8-67	Filed stip. & order extending time of defts to answer second amended complaint to 8-10-67 —Motley, J.
Aug. 9-67	Filed defts' Clark, Francis, Kircher, Puckett, Reavis, Thornton & Wilde affdvt. & notice of motion to strike jury demand ret. 8-15-67
Aug. 9-67	Filed defts' memorandum in support of its motion
Aug. 10-67	Filed answer of defts (Howard L. Clark et al.) to amended complaint
Aug. 14-67	Filed answer of defts Bernhard et al. to to amended complaint
Aug. 14-67	Filed answer of defts Bernhard et al. to amended complaint
Aug. 14-67	Filed stipulation between parties—for order to strike pltffs' demand for Jury trial & transfer case to non-jury cal—adjourned from 8-15-67 to 8-29-67

Docket Entries

DATE	PROCEEDINGS
Sept. 5-67	Filed additional summons—Served Charles B. Thornton—by him—Central Dist. of Cal. 3-6-67
Sept. 5-67	Filed add. summons & ret—unexecuted—on Ernest Breech.—8-10-67
Sept. 5-67	Filed add. summons & ret—Rosenthal & Gurkin—Served P. L. Davies 4-26-67—ND of Cal.
Sept. 5-67	Filed add. summons & ret—Served C. Francis—by Mrs. B. F. Wright—Daughter—3-2-67—D. P. Kircher—personally on 3-1-67—unable to find T. A. Morgan.—served B. E. Puckett—personally on 3-2-67
Sept. 11-67	Filed Amended Answer of deft. (Lehman Corp.)
Sept. 10-67	Filed deft (Behrnard et al.) interrogs.
(E)	
Aug. 28-67	Filed pltff's memorandum in opposition to defts' motion to defts' motion to strike pltffs' demand for jury trial
Nov. 6-67	Filed memo endorsed on motion filed 8-9-67—deft's motion to strike Jury Demand is denied—So ordered—McLean, J. mailed notice.
Nov. 20-67	Filed deft's (Clark Francis) notice of motion (with affdvt.—amend & resettle order Ret. 11-28-67)

Docket Entries

DATE	PROCEEDINGS
Nov. 20-67	Filed deft's memorandum in support of motion to amend etc.
Nov. 21-67	Filed pltff's memorandum in opposition to deft's motion to amend & resettle order
Nov. 22-67	Filed order pursuant to rules 6 & 13—Sugarman, J.
Nov. 28-67	Filed Designation of Trial Counsel for Plaintiffs.
Nov. 29-67	Filed Reply Memorandum in support of defts' motion to amend.
Nov. 29-67	Filed Memo. End. on motion papers filed 11/20/67. Motion granted. Settle order on notice. McLean, J. (mailed notice)
Nov. 29-67	Filed deft's (Bernhard et al.) notice of designation of trial counsel
Nov. 30-67	Filed pltffs' answers to defts' interrogs of 10-5-67
Nov. 30-67	Filed deft's (Clark et al.) notice of designation of trial counsel
Dec. 1-67	Filed deft (Lehman Corp.) notice of designation of trial counsel

Docket Entries

DATE	PROCEEDINGS
Dec. 1-67	Filed stip. & order—extending time of pltffs' to answer interrogs of 10-5-67 to 12-5-67—Mansfield, J.
Dec. 6-67	Filed defts (Clark Francis et al.) notice of appeal—Mailed copies 12-6-67 to Rosenthal & Gurkin and Pomerantz, Levy Haudek & Block.
Dec. 7-67	Filed order—that motion of defts is granted and that memorandum & order file 11-6-67 be amended etc. as indicated—McLean, J. mailed notice
Jan. 12-68	Filed affidavit of Richard M. Meyer
Jan. 12-68	Filed deft's affdvt & notice of motion for 9L application etc. ret. 1-4-68
Jan. 12-68	Filed memo endorsed on motion filed 1-12-68—9L application denied—settle order on notice—Bonsal, J.
Jan. 15-68	Filed Notice of Appeal (mailed copy)
Jan. 12-68	Pre-Trial—Bonsal, J.
Feb. 23-68	Filed Defts. (Clark) Stipulation

Second Amended Complaint

(40)

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

65 Civ. 665

HOWARD ROSS and BERNARD ROSS, as Trustees for LENA ROSENBAUM,

Plaintiffs,

—against—

ROBERT A. BERNHARD, ERNEST R. BREECH, HOWARD L. CLARK, LUCIUS D. CLAY, PAUL L. DAVIES, FREDERICK L. EHRMAN, CLARENCE FRANCIS, MONROE C. GUTMAN, JAMES K. HART, JAMES M. HESTER, DONALD P. KIRCHER, ROBERT LEHMAN, PAUL E. MANHEIM, PAUL M. MAZUR, THOMAS A. MORGAN, ALVIN W. PEARSON, T. S. PETERSEN, B. EARL PUCKETT, JOHN W. REAVIS, CHARLES B. THORNTON, FRAZAR B. WILDE: and MONROE C. GUTMAN, ROBERT LEHMAN, JOSEPH A. THOMAS, PAUL M. MAZUR, H. J. SZOLD, FREDERICK L. EHRMAN, HERMAN M. KAHN, PAUL E. MANHEIM, EDWIN L. KENNEDY, MORRIS NATELSON, ALLAN B. HUNTER, FRANK J. MANHEIM, WILLIAM H. OSBORNE, JR., MARCEL A. PALMARO, ROBERT A. BERNHARD, ARTHUR D. SCHULTE, ALVIN W. PEARSON, individually and as partners doing business under the firm name and style of LEHMAN BROTHERS and THE LEHMAN CORPORATION,

Defendants.

Second Amended Complaint

PLAINTIFFS DEMAND TRIAL BY JURY

Plaintiffs by their attorneys, Rosenthal & Gurkin, for their complaint, allege on information and belief, except as to paragraph 2, which is alleged on knowledge:

1. The jurisdiction of the Court is based on the Investment Company Act of 1940, 15 U.S.C. Secs. 80 a-1, et seq. and on the principles of pendent jurisdiction.

2.(a) Plaintiffs are shareholders of defendant, The Lehman Corporation (the "Corporation"), and they and their predecessor in interest have been shareholders since 1961, and at the times of the wrongs complained of herein.
(41)

(b) Plaintiffs bring this action derivatively on behalf of the Corporation and representatively on behalf of themselves and all other shareholders of the Corporation similarly situated.

(c) This action is not brought collusively to confer on the Court jurisdiction which it otherwise would not have.

3.(a) The Corporation is organized under the laws of Delaware, and has its principal office at One South William Street, in the City, County and State of New York.

.(b) The Corporation has been at all times relevant hereto, and now is a diversified closed-end management investment company, and it is registered as such under the Investment Company Act of 1940 (the "Act"), 15 U.S.C. Sections 80 a-1 et seq.

4.(a) Defendants, Bernhard, Breech, Clark, Clay, Davies, Ehrman, Francis, Gutman, Hart, Hester, Kircher, Lehman, Manheim, Mazur, Morgan, Pearson, Petersen, Puckett, Reavis, Thornton and Wilde are or have been the Corporation's directors.

(b) In addition, defendant Lehman is chairman of the Corporation's board of directors; defendant Gutman is vice-chairman; defendant Pearson is president; defendant Hart is executive vice-president; and defendant Manheim is or has been vice-president.

5. Defendants Lehman, Gutman, Mazur, Thomas, Ehrman, Szold, Manheim, Kahn, Natelson, Kennedy, Manheim, Hunter, Palmaro, Osborn [sic], Schulte, Bernhard and Pearson are partners in Lehman Brothers.

6. Lehman Brothers is an investment banking firm, and is a member of the New York Stock Exchange and other (42) exchanges. Its principal office is at One William Street, in the City, County and State of New York.

7. Lehman Brothers is able to and does dominate and control the Corporation and its personnel, its policies and its board of directors. Lehman Brothers' partners occupy the key executive posts of the Corporation, including board chairman, vice-chairman, president and vice-president.

8. The Corporation, a registered investment company, invests and reinvests its assets in the securities of other companies, most of which are traded on the New York Stock Exchange.

9.(a) Lehman Brothers acts as the Corporation's broker for most of the Corporation's portfolio transactions, and receives therefor the standard stock exchange commissions.

(b) In 1964, the Corporation incurred brokerage commissions of $531,724. Of this amount, $442,903 was paid to Lehman Brothers (of which $48,480 was paid to other brokers). Similar amounts were incurred and paid in prior years. Over the past five years, Lehman Brothers has received approximately $2,000,000 (two million) in brokerage commissions from the Corporation.

(c) In 1965, the Corporation incurred brokerage commissions of $538,622. Of this amount $334,685 was paid to Lehman Brothers (of which $41,688 was paid to other brokers).

(d) In 1966, the Corporation incurred brokerage commissions of $405,772. Of this amount $351,640 was paid to Lehman Brothers (of which $43,085 was paid to other brokers). These expenses and payments are continuing at the present time.

(43)

10. The Corporation's brokerage commission payments to Lehman Brothers have been and are for the mechanical execution of the Corporation's portfolio transactions; Lehman Brothers makes a separate charge for any other services it renders.

11. Lehman Brothers has made and continues to make a substantial profit from the brokerage commissions it receives from the Corporation.

12. This brokerage profit that Lehman Brothers realizes at the Corporation's expense is not an expense that the Corporation need—or should—incur. Most of the Corporation's portfolio transactions for which Lehman Brothers has received and continues to receive substantial commissions are transactions that are carried out on the New York Stock Exchange or other national securities exchanges. However, these same transactions could be executed otherwise than on a national securities exchange, in the so-called "Third Market", at favorable net prices without the payment of any commissions, or they could be conducted otherwise than on a national securities exchange at favorable prices with the payment of substantially smaller commissions than those paid by the Corporation.

13. The Corporation purchases and sells a substantial amount of securities which are not listed on a national securities exchange and are traded exclusively in the over-the-counter market. The Corporation makes most of its purchases and sales of such securities through Lehman Brothers, for which it has paid and continues to pay Lehman Brothers substantial brokerage commissions at rates equal to those prevailing on the New York Stock Exchange.

(44)

14. In so executing transactions, the Corporation has failed to obtain the most favorable prices and executions for the purchase and sale of portfolio securities. Instead, the Corporation has interposed Lehman Brothers between the Corporation and those brokers and dealers and others from whom the most favorable prices and executions are available.

15. The brokerage commissions received by Lehman Brothers for the execution of over-the-counter transactions are gratuitous payments to Lehman Brothers for which no service of value is rendered. They consist of commissions for transactions executed in the over-the-counter market with "market makers" (i.e., dealers who advertise their willingness to buy and sell particular securities) and others, all of whom would have dealt directly with the Corporation on the same basis as they dealt with Lehman Brothers. By dealing directly with such persons, the Corporation could have saved the commissions paid to Lehman Brothers.

16. The opportunity to control the brokerage business generated by the Corporation's own portfolio transactions which should belong to the Corporation has been diverted by Lehman Brothers. As a result of this diversion, the Corporation has suffered at least these damages: The Corporation has not been able to conduct its own brokerage business; and it has not been able to obtain the lowest brokerage commissions that are available.

17. The reason the Corporation makes virtually all of its purchases and sales through the facilities of Lehman Brothers and the stock exchanges is that Lehman Brothers, which dominates and controls the Corporation, prefers to profit at the Corporation's expense and to its detriment.

(45)

18. (a) Approximately 15% of the brokerage commissions paid by the Corporation has been and continues to be

allocated to brokers who provide investment advice to Lehman Brothers. The practice of thus allocating an investment company's brokerage commissions is known in the investment company industry as "reciprocal brokerage".

(b) Lehman Brothers is limited in its compensation as investment adviser of the Corporation to the amount provided in its investment advisory contract with the Corporation. By the use of reciprocal brokerage, Lehman Brothers receives compensation in excess of the amount specified therein.

(c) If it were not for the use of reciprocal brokerage, Lehman Brothers would be forced to pay out of its own pocket for the investment advice it receives from other brokers.

(d) Reciprocal brokerage provides excessive compensation for Lehman Brothers in violation of the investment advisory contract and the Act.

(e) The utilization of reciprocal brokerage to benefit Lehman Brothers has deprived the Corporation of the opportunity to deal in the third market and to realize savings thereby.

19. The Act (Sec. 10(b) (1)) requires that the Corporation's board of directors be composed of persons a majority of whom are unaffiliated with Lehman Brothers, the Corporation's broker. But at all times relevant hereto at least 50% of the Corporation's directors were and they are affiliated with Lehman Brothers by reason of their being partners in Lehman Brothers, or by reason of their being (46) directly or indirectly conrtolled by, or under common con-

trol with Lehman Brothers in violation of Sections 10(b) (1), 2(a) (3) and 2(a) (9) of the Act.

20. By reason of these violations of the Act, the brokerage commissions paid by the Corporation to Lehman Brothers have been and are illegal.

21. The payment of these brokerage commissions to Lehman Brothers and others has constituted and continues to constitute an unlawful and willful conversion by Lehman Brothers and the individual defendants of the monies, funds, property and assets of the Corporation to the use of Lehman Brothers in violation of Sec. 37 of the Act; and gross abuse of trust, gross misconduct, willful misfeasance, bad faith, gross negligence and a reckless disregard of their fiduciary duties by the Corporation's officers, directors and brokers in violation of the duties which the Act (Secs. 1(b) (2), 10, 17 (h) and (i) and 36) expressly and by necessary implication imposes upon officers, directors and brokers of investment companies.

22. The payment of these excessive brokerage commissions by the Corporation to Lehman Brothers and others constituted and constitutes a breach by the individual defendants and Lehman Brothers of the fiduciary duties they owe to the Corporation; and the payments of the brokerage commissions amount to a waste and spoliation of the Corportion's assets for the benefit and profit of Lehman Brothers and the individual defendants, but to the harm and detriment of the Corporation.

23. Demand on the Corporation's board of directors to bring this action would be futile because;

(47) (a) The defendant directors are the principal wrong-doers, some of whom have personally profited from the illegal and improper acts alleged herein;

(b) A majority of the Corporation's directors participated in the alleged wrongs; and

(c) The institution of this action by the directors would place it in hostile hands and would prevent its effective prosecution.

20. The Corporation has about 35,000 shareholders. They are so numerous as to make it impracticable to bring them all before the Court. Plaintiff will fairly insure their adequate representation.

WHEREFORE, plaintiff prays for judgment:

A. Requiring the defendants jointly and severally to account for and pay to the Corporation for their profits and gains and its losses;

B. Awarding the plaintiff the costs and expense of this action, including reasonable counsel fees; and

C. Granting plaintiff such other and further relief as may be just.

ROSENTHAL & GURKIN
Attorneys for Plaintiff
19 West 44th Street
New York, N. Y.

(Verified by Alfred Gurkin on June 23, 1967).

Notice of Motion on Behalf of Defendants

(50)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Cornelius B. Prior, Jr., sworn to July 28, 1967, the second amended complaint filed on July 14, 1967 and upon all the pleadings and papers filed herein, defendants will move this Court at a motion part thereof, at the United States Courthouse, Room 506, Foley Square, New York, New York, on August 15, 1967, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order pursuant to Rule 39(a) (2) of the Federal Rules of Civil Procedure striking plaintiffs' demand for jury trial and transferring this case to the Non-Jury Calendar on the grounds that plaintiffs have no right to a jury under the Constitution or statutes of the United States.

Dated: New York, New York
August 4, 1967

Yours, etc.,

SULLIVAN & CROMWELL
By JOHN DICKEY
(A Member of the Firm)
Attorneys for Defendants
Clark, Francis, Kircher,
Puckett, Reavis, Thornton
and Wilde
48 Wall Street,
New York, New York 10005

Notice of Motion on Behalf of Defendants

(51)

SIMPSON THACHER & BARTLETT

By ROY L. REARDEN
(A Member of the Firm)
Attorneys for Defendants
Robert A. Bernhard, et al.,
120 Broadway
New York, New York 10005

WALSH & FRISCH

By E. ROGER FRISCH
(A Member of the Firm)
Attorneys for Defendant
The Lehman Corporation,
250 Park Avenue,
New York, New York 10017

To:

ROSENTHAL & GURKIN,
Attorneys for Plaintiffs,
19 West 44th Street,
New York, New York 10017.

POMERANTZ LEVY HAUDEK & BLOCK,
Attorneys for Plaintiffs,
295 Madison Avenue,
New York, New York 10017.

Affidavit of Cornelius B. Prior, Jr. in Support of Foregoing Motion

(52)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

CORNELIUS B. PRIOR, JR., being duly sworn, deboses and says:

1. I am associated with Sullivan & Cromwell, counsel for defendants, Clark, Francis, Kircher, Puckett, Reavis, Thornton and Wilde. I am familiar with the facts and proceedings in this action and make this affidavit in support of the instant motion by all defendants to strike plaintiffs' demand for jury trial.

2. The original complaint in this action was filed on March 4, 1965, alleging that the individual defendants, directors of The Lehman Corporation ("Corporation"), had breached their fiduciary duties to the Corporation by effecting security transactions for the Corporation's investment portfolio on registered securtity exchanges rather than off the exchanges in what plaintiffs call a "third-market", where commissions are allegedly lower. A jury trial was demanded.

Affidavit of Cornelius B. Prior, Jr. in Support of Foregoing Motion

3. On February 7, 1967, the complaint was amended, with the consent of defendants, in order to substitute as plaintiffs the present trustees for Lena Rosenbaum following (53) the death of the prior trustee. On March 21, 1967, an order was entered granting plaintiffs leave to file a supplemental complaint which renewed the original claims with respect to the period subsequent to the filing of the original complaint.

4. On May 25, 1967, plaintiffs moved for an order granting them leave to file a second amended complaint setting forth additional claims based on alleged "interpositioning" and "reciprocal business". Plaintiffs' motion was granted by this Court following a hearing before Judge Bonsal on June 21, reserving to defendants the right to discovery with respect to the new claims and the right to show at trial that the new claims do not relate back to the date of the original complaint.

5. Plaintiffs' note of issue was filed on June 30, 1967. The second amended complaint was filed on July 13 (a copy is annexed hereto as Exhibit A), again with an endorsed demand for jury trial. On July 21 defendants were notified by the Calendar Clerk that the case had been assigned to Jury Calendar Number 2 (Calendar No. 177).

(Sworn to by Cornelius B. Prior, Jr. on July 28, 1967).

Answer of Defendants Howard L. Clark, et al., to Second Amended Complaint

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendants Howard L. Clark, Clarence Francis, Donald P. Kircher, John W. Reavis, Charles B. Thornton, B. Earl Puckett and Frazar B. Wilde, by their attorneys, Sullivan & Cromwell, answering the second amended complaint herein:

1. Deny each and every allegation of paragraph 1.

2. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 2, except deny that this action is brought for the benefit of defendant The Lehman Corporation ("Corporation").

3. Deny each and every allegation of paragraph 6, except admit that Lehman Brothers is an investment banking firm, is a member firm of the New York Stock Exchange and other exchanges, and has its principal office at One William Street in the City, County and State of New York.

4. Deny each and every allegation of paragraph 7, except admit that partners of Lehman Brothers occupy the positions of Chairman of the Board, Vice Chairman of the Board, President and Executive Vice President of the Corporation.

5. Deny each and every allegation of paragraph 8, except admit: The Corporation is registered under the Investment Company Act of 1940. The Corporation's assets are invested almost entirely in securities of other corporations and, for the most part, the securities held by the Corporation are listed on the New York Stock Exchange.

6. Deny each and every allegation of paragraph 9, except admit that a substantial part of the Corporation's portfolio transactions are executed by Lehman Brothers, always at commission rates which do not exceed the minimum rates prescribed by the stock exchange upon which the transaction is executed. During the past five years Lehman Brothers has received commissions from the Corporation. The amounts paid from 1964 through 1966 are as follows:

	1964	1965	1966
Total brokerage commissions paid by Corporation	$531,724	$538,622	$405,772
Commissions paid to Lehman Brothers	442,903	334,685	351,640
Payments by Lehman Brothers to other brokers out of commissions paid by Corporation	48,480	41,688	43,085

7. Deny each and every allegation of paragraph 10.

8. Deny each and every allegation of paragraph 11, except admit, on information and belief that Lehman Brothers earns profits on the brokerage commissions received by it from the Corporation.

9. Deny each and every allegation of paragraph 12.

10. Deny each and every allegation of paragraph 13, except admit that the Corporation purchases and sells securities which are not listed on a national securities exchange from time to time and that some of these transactions are effected for the Corporation by Lehman Brothers.

11. Deny each and every allegation in paragraphs 14, 15, 16, 17 and 18.

12. Deny each and every allegation of paragraph 19 and begs leave to refer for the terms thereof to the Investment Company Act of 1940.

13. Deny each and every allegation of paragraphs 20, 21, 22, and 23.

14. Deny each and every allegation of paragraph 24 (erroneously numbered "20" in the second amended complaint), except admit that the Corporation has approximately 35,000 shareholders.

FIRST AFFIRMATIVE DEFENSE

15. Plaintiffs have failed without legal excuse or justification to make demand upon the Board of Directors of the Corporation that the claim or claims alleged in the second amended complaint be asserted by the Corporation.

SECOND AFFIRMATIVE DEFENSE

16. Plaintiffs have failed without legal excuse or justification to make demand upon the stockholders of the

Corporation that the claim or claims alleged in the second amended complaint be asserted by the Corporation.

THIRD AFFIRMATIVE DEFENSE

17. The cause or causes of action alleged in the second amended complaint did not accrue within six years next prior to the commencement of the action.

FOURTH AFFIRMATIVE DEFENSE

18. The cause or causes of action alleged in the second amended complaint did not accrue within three years next prior to the commencement of the action.

FIFTH AFFIRMATIVE DEFENSE

19. Plaintiffs have been guilty of inordinate delay in commencing this action and, accordingly, this action is barred by laches.

SIXTH AFFIRMATIVE DEFENSE

20. Plaintiffs have approved and ratified the acts alleged as a cause or causes of action in the second amended complaint and are thereby estopped from maintaining this action.

SEVENTH AFFIRMATIVE DEFENSE

21. The claims alleged concerning "reciprocal brokerage" and "interpositioning" in paragraphs 13 through 15

and 18 and related paragraphs of the second amended complaint did not accrue within three years next prior to assertion of said claims by service of the second amended complaint and do not relate back to the date of the commencement of this action.

22. The claims alleged concerning "reciprocal brokerage" and "interpositioning" in paragraphs 13 through 15 and 18 and related paragraphs of the second amended complaint did not accrue within six years next prior to assertion of said claims by service of the second amended complaint and do not relate back to the date of the commencement of this action.

WHEREFORE, defendants Clark, Francis, Kircher, Puckett, Reavis, Thornton and Wilde demand judgment dismissing the second amended complaint, together with the costs and disbursements of this action.

SULLIVAN & CROMWELL

By MARVIN SCHWARTZ
(A Member of the Firm)
Attorneys for Defendants Clark,
Francis, Kircher, Puckett, Reavis,
Thornton and Wilde,
48 Wall Street,
New York, N. Y. 10005.
HAnover 2-8100

Answer of Defendants Robert A. Bernhard, *et al.*, to Second Amended Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendants Robert A. Bernhard, Lucius D. Clay, Frederick L. Ehrman, Monroe C. Gutman, Robert Lehman, Paul E. Manheim, Paul M. Mazur, Alvin W. Pearson, Joseph A. Thomas, H. J. Szold, Herman H. Kahn, Morris Natelson, Edwin L. Kennedy, Frank J. Manheim, Allan B. Hunter, Marcel A. Palmaro, William H. Osborne, Jr., Arthur D. Schulte and Paul L. Davies, individually and as partners doing business under the firm name and style of Lehman Brothers, by their attorneys Simpson Thacher & Bartlett, for their answer to the second amended complaint:

First: Deny each and every allegation contained in paragraphs "1", "10", "12", "14", "15", "16", "17", "18", "20", "21", "22" and "23" of the second amended complaint.

Second: Deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph "2" of the second amended complaint, except that they admit that this action is not brought collusively to confer on the Court jurisdiction which it otherwise would not have.

Answer of Defendants Robert A. Bernhard, et al., to Second Amended Complaint

Third: Deny each and every allegation contained in paragraph "6" of the second amended complaint, except that they admit that Lehman Brothers is an investment banking firm, is a member firm of the New York Stock Exchange and other exchanges and that its principal office is at One William Street in the City, County and State of New York.

Fourth: Deny each and every allegation contained in paragraph "7" of the second amended complaint, except that they admit that the Chairman of the Board of Directors, the Vice Chairman of the Board of Directors, the president and the executive vice president of defendant The Lehman Corporation are also members of the firm of Lehman Brothers.

Fifth: Deny each and every allegation contained in paragraph "8" of the second amended complaint, except that they admit that defendant The Lehman Corporation is registered under the Investment Company Act of 1940, that its assets are invested almost entirely in securities of other corporations and that, for the most part, the securities held by it are listed on the New York Stock Exchange.

Sixth: Deny each and every allegation contained in paragraph "9" of the second amended complaint, except that they admit that Lehman Brothers acts as broker for defendant The Lehman Corporation with respect to most of said defendant's portfolio transactions, that Lehman Brothers receives for such brokerage services such commissions as are provided for by the rules of the stock exchanges upon which such transactions are effected, and that, in the years

1960 through 1966, the brokerage commissions incurred by defendant The Lehman Corporation, the portions of such commissions paid to Lehman Brothers and the amounts paid in turn by Lehman Brothers to other brokers, were as follows:

Year	Brokerage Commissions Incurred by The Lehman Corporation	Paid to Lehman Brothers	Paid by Lehman Brothers to other Brokers
1960	$387,490	$323,452	$30,008
1961	$635,562	$536,948	$53,969
1962	$486,163	$421,498	$42,887
1963	$371,399	$320,918	$33,251
1964	$531,724	$442,903	$48,480
1965	$538,622	$334,685	$41,688
1966	$405,772	$351,640	$43,085

Seventh: Deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph "11" of the second amended complaint.

Eighth: Deny each and every allegation contained in paragraph "13" of the second amended complaint, except that they admit that defendant The Lehman Corporation from time to time purchases and sells securities which are not listed on a national securities exchange, and that some of such transactions are effected for it by Lehman Brothers.

Ninth: Deny each and every allegation contained in paragraph "19" of the second amended complaint, except that they refer, for the terms thereof, to the Investment Company Act of 1940.

Answer of Defendants Robert A. Bernhard, et al., to Second Amended Complaint

Tenth: Deny each and every allegation contained in paragraph "24" (erroneously numbered "20") of the second amended complaint, except that they admit that defendant The Lehman Corporation has approximately 35,000 shareholders.

FIRST DEFENSE

Eleventh: The second amended complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Twelfth: The claims alleged in the second amended complaint are barred in whole or in part by the applicable Statute of Limitations or by laches.

THIRD DEFENSE

Thirteenth: The second amended complaint fails to set forth with particularity the efforts of plaintiffs to secure from the managing directors of defendant The Lehman Corporation or from the shareholders of said defendant such action as they desire or the reasons for not making such effort.

FOURTH DEFENSE

Fourteenth: Plaintiffs have not sought to secure from the managing directors of defendant The Lehman Corporation or from the shareholders of said defendant the relief sought in the second amended complaint or that an action seeking such relief be brought.

Answer of Defendants Robert A. Bernhard, et al., to Second Amended Complaint

FIFTH DEFENSE

Fifteenth: Plaintiffs have approved and ratified the acts alleged in the second amended complaint and are estopped from maintaining this action.

WHEREFORE defendants Bernhard, Clay, Ehrman, Gutman, Lehman, Manheim, Mazur, Pearson, Thomas, Szold, Kahn, Natelson, Kennedy, Manheim, Hunter, Palmaro, Osborne, Schulte and Davies, individually and as partners doing business under the firm name and style of Lehman Brothers, demand judgment dismissing the second amended complaint, together with the costs and disbursements of this action.

SIMPSON THACHER & BARTLETT

By: DANIEL G. SACKS
A Member of the Firm
Attorneys for Defendants
Bernhard, Clay, Ehrman, Gutman,
Lehman, Manheim, Mazur, Pearson,
Thomas, Szold, Kahn, Natelson,
Kennedy, Manheim, Hunter,
Palmaro, Osborne, Schulte and
Davies, individually and as
partners doing business under
the firm name and style of
Lehman Brothers
Office and P.O. Address
120 Broadway
New York 5, N. Y.
WOrth 4-1900

Answer of Defendant The Lehman Corporation to Second Amended Complaint

UNITED STATES DISTRICT COURT

For the Southern District of New York

[Same Title]

Defendant, The Lehman Corporation, by its attorneys, Walsh & Frisch, answering the amended complaint:

1. Denies each and every allegation contained in paragraphs 1, 10, 12, 14, 15, 16, 17, 20, 21, 22, and 23 of the amended complaint.

2. Denies information and knowledge sufficient to form a belief as to the allegation contained in paragraphs 2 and 18 of the amended complaint.

3. Denies each and every allegation contained in paragraph 7 of the amended complaint, except admits that the persons occupying the positions of Chairman of the Board, Vice Chairman of the Board, President and Executive Vice President of The Lehman Corporation are partners of Lehman Brothers.

4. Denies each and every allegation contained in paragraph 9 of the amended complaint, except admits that a substantial part of The Lehman Corporation portfolio transactions were executed by Lehman Brothers at commission rates which never exceed the minimum rates prescribed by the stock exchange upon which the transaction

is executed; and on information and belief, admits that during the past five years, Lehman Brothers has received commissions from The Lehman Corporation and that for the years 1964, 1965 and 1966, the brokerage commissions incurred by The Lehman Corporation were as alleged, the portion of such brokerage commissions paid to Lehman Brothers were as alleged and the portion of those commissions paid to Lehman Brothers which were then paid to other brokers were as alleged.

5. Denies each and every allegation contained in paragraph 11 of the amended complaint, except admits on information and belief that Lehman Brothers earns profits on the brokerage commissions received by it from The Lehman Corporation.

6. Denies each and every allegation contained in paragraph 13 of the amended complaint, except admits that The Lehman Corporation purchases and sells securities which are not listed on a national securities exchange from time to time and that some of these transactions are effected by Lehman Brothers.

7. Denies each and every allegation contained in paragraph 19 of the amended complaint and begs leave to refer to the Investment Act of 1940 for the true terms thereof.

8. Denies each and every allegation contained in paragraph 24 of the amended complaint (erroneously numbered "20"), except admits that The Lehman Corporation has approximately 35,000 shareholders.

Answer of Defendant The Lehman Corporation to Second Amended Complaint

FIRST AFFIRMATIVE DEFENSE

9. Plaintiffs have failed without legal excuse or justification to make demand upon the Board of Directors of The Lehman Corporation that the claim or claims alleged in the amended complaint be asserted by The Lehman Corporation.

SECOND AFFIRMATIVE DEFENSE

10. Plaintiffs have failed without legal excuse or justification to make demand upon the stockholders of The Lehman Corporation that the claim or claims alleged in the amended complaint be asserted by The Lehman Corporation.

THIRD AFFIRMATIVE DEFENSE

11. The cause or causes of action alleged in the amended complaint did not accrue within six years next prior to the commencement of the action.

FOURTH AFFIRMATIVE DEFENSE

12. The cause or causes of action alleged in the amended complaint did not accrue within three years next prior to the commencement of the action.

FIFTH AFFIRMATIVE DEFENSE

13. Plaintiffs have been guilty of inordinate delay in commencing this action and, accordingly, this action is barred by laches.

Answer of Defendant The Lehman Corporation to Second Amended Complaint

SIXTH AFFIRMATIVE DEFENSE

14. Plaintiffs have approved and ratified the acts alleged as a cause or causes of action in the amended complaint and are thereby estopped from maintaining this action.

SEVENTH AFFIRMATIVE DEFENSE

15. The claims alleged concerning "reciprocal brokerage" and "interpositioning" in paragraphs 13 through 15 and 18 and related paragraphs do not relate back to the date of the filing of the original complaint herein.

WHEREFORE, defendant The Lehman Corporation demands judgment dismissing the amended complaint, together with the costs and disbursements of this action.

WALSH & FRISCH

by E. ROGER FRISCH
(A Member of the Firm)
Attorneys for defendant The
Lehman Corporation
250 Park Avenue
New York, N. Y. 10017
MU 7-7161

Memorandum and Order

(83)

Ross v. Bernhard, et al., 65 Civ. 665
Civ. Mot. Cal. Aug. 29, 1967 No. 69

This is a stockholders' derivative action by stockholders of The Lehman Corporation against directors of that corporation and against Lehman Brothers, the corporation's broker.* The complaint charges in substance that The Lehman Corporation has paid to Lehman Brothers brokerage commissions which are excessive for a variety of reasons and that the assets of The Lehman Corporation have thereby been wasted. This is said to be a violation of the Investment Company Act of 1940 (15 U.S.C. § 80a-1 *et seq.*). Defendants Clark, Francis, Kircher, Puckett, Reavis, Thornton, and Wilde move to strike plaintiffs' demand for a jury trial.

Whether or not plaintiffs are entitled to a jury trial depends upon the answer to two questions:

(84) (1) Does the fact that this is a stockholders' derivative action, a creature of equity, in and of itself deprive plaintiffs of a trial by jury?

(2) If not, and if the question of a jury trial is to be viewed as though the corporation were suing, is the action a "suit at common law" within the meaning of the Seventh Amendment?

As to the first question, opposite conclusions were reached in *Richland* v. *Crandall*, 259 F. Supp. 274 (S.D.N.Y. 1966),

* The complaint alleges that plaintiffs also sue representatively on behalf of themselves and of other stockholders of The Lehman Corporation similarly situated. Both sides agree, however, that this action is actually purely derivative, as the only relief sought is for the benefit of The Lehman Corporation. Consequently, the representative allegation has no bearing upon the issues raised by this motion.

and *DePinto* v. *Provident Security Life Insurance Company*, 323 F. 2d 826 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1964). In my opinion the *DePinto* view is the correct one. The court there held that although the aid of equity is needed in order to establish the stockholders' right to sue on behalf of the corporation, the claim is that of the corporation and the right to a jury trial is to be judged as though the corporation were suing. This decision gives effect to *Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U.S. 27 (1916), and *Fanchon & Marco, Inc.* v. *Paramount Pictures, Inc.*, 202 F. 2d 731 (2d Cir. 1953), in which this result was reached in antitrust treble damage (85) actions. I see no reason why this rule should be peculiar to antitrust litigation. I will follow it here.

As to the second question, the allegations of the complaint are controlling. The complaint uses a number of harsh words. It charges that defendants have been guilty of "gross abuse of trust, gross misconduct, willful misfeasance, bad faith, gross negligence and a reckless disregard of their fiduciary duties." The prayer is for a judgment "requiring the defendants jointly and severally to account for and pay to the Corporation for their profits and gains and its losses."

The fact that plaintiffs seek an accounting, a word which smacks of equity, is not determinative.

Dairy Queen, Inc. v. *Wood*, 369 U.S. 469 (1962)

Plaintiffs are seeking a money judgment. They ask that defendants "pay" to the corporation defendants' gains and the corporation's loss. The issues are not so complicated as to make it impracticable for a jury to ascertain the amount, if any, to which plaintiffs may be entitled.

(86)

It is true that the complaint employs equitable language in alleging that defendant directors have abused their trust and have disregarded their fiduciary duties. But the alleged facts which underly thes conclusions are simply that defendants have caused the corporation to pay out money which the corporation should not have paid, and that in consequence, the corporation is entitled to judgment for those moneys. This diversion of funds is alleged to be a conversion by defendants of the corporate assets. Whatever the law may formerly have been, I am persuaded that recent decisions of the Supreme Court, which have gone far in protecting the right to a jury trial under the Seventh Amendment, require the conclusion that this complaint states on behalf of the corporation a claim which is fundamentally legal rather than equitable.

Dairy Queen, Inc. v. *Wood, supra;*
Beacon Theatres, Inc. v. *Westover,* 359 U.S. 500 (1959);
See also DePinto v. *Provident Security Life Insurance Company, supra.*

(87)

Defendants' motion is denied.

So ordered.

Dated: November 3, 1967

EDWARD C. McLEAN
U.S.D.J.

Notice of Defendants' Motion to Amend and Resettle
(88)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. § 1292(b), the undersigned will move at a motion part of this court at 10:00 A.M. on November 28, 1967, in Room 506, United States Courthouse, Foley Square, New York, New York, for an order amending and resettling this court's memorandum and order filed November 6, 1967 by adding on page 5, an additional paragraph as follows: "The court is of the opinion that this order denying the motion of all defendants to strike plaintiffs' demand for jury trial involves a controlling question of law as to which there are substantial grounds for difference of opinion and that an immediate appeal from this order as authorized by 28 U.S.C. § 1292(b) may materially advance the ultimate determination of this litigation."

Dated: New York, New York
November 16, 1967

Yours, etc.,

SULLIVAN & CROMWELL,

By MARVIN SCHWARTZ
(A Member of the Firm)
Attorneys for Defendants
Clark, Francis, Kircher,
Puckett, Reavis, Thornton
and Wilde,
48 Wall Street, New York, N.Y. 10005

Notice of Defendants' Motion to Amend and Resettle Order Dated December 6, 1967

(89)

SIMPSON THACHER & BARTLETT

By WILLIAM J. MANNING
(A Member of the Firm)
Attorneys for Defendants
Robert A. Bernhard, et al.,
120 Broadway,
New York, N. Y. 10005

WALSH & FRISCH

By E. ROGER FRISCH
(A Member of the Firm)
Attorneys for Denfendant
The Lehman Corporation,
250 Park Avenue,
New York, N. Y. 10017

To:

ROSENTHAL & GURKIN,
Attorneys for Plaintiffs,
19 West 44th Street,
New York, N. Y. 10038

POMERANTZ, LEVY, HAUDEK & BLOCK,
Counsel for Plaintiffs,
295 Madison Avenue,
New York, N. Y. 10017.

Order Dated December 6, 1967

(94)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The Court having entered an order herein on November 6, 1967 denying defendants' motion to strike plaintiffs' demand for jury trial, and defendants having moved by notice of motion dated November 16, to amend and resettle the said order of November 6, to permit interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Now, upon all of the papers and proceedings heretofore had herein, and due deliberation having been had, the Court finds that said order of November 6 involves a controlling question of law, that there are substantial grounds for difference of opinion as to this question and that an immediate appeal would materially advance the ultimate termination of this litigation and it is hereby

ORDERED that the motion of defendants be and it hereby is granted, and it is further

ORDERED that the memorandum and order filed herein on November 6, 1967 be amended to include a final paragraph as follows: "The Court is of the opinion that this order denying defendants' motion to strike plaintiffs' demand for jury trial in this stockholders' derivative action involves (95) a controlling question of law as to which there is sub-

stantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation."

Dated: New York, New York
December 6, 1967

EDWARD C. McLEAN
U. S. D. J.

Affidavit of James B. Downing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JAMES B. DOWNING, being duly sworn, deposes and says:

I am Vice President and Treasurer of defendant-petitioner The Lehman Corporation (the "Corporation") on whose behalf plaintiffs allegedly bring this action. I submit this affidavit in support of petitioners' Application to this Court for review of the order of the United States District Court for the Southern District of New York (McLean, J.) entered December 7, 1967, which permits a jury trial of this case.

The Corporation is a closed-end investment company founded in 1929. At the present time the portfolio of securities of the Corporation has a value of over $500 million. During the past six years over 90% of the value of this portfolio has been made up of common stocks, the great majority of which have been listed on registered securities exchanges. The investment activity of the Corporation depends upon the purchase and sale of such securities for its portfolio.

One of the plaintiffs' claims in this case is that the Corporation should not effect transactions in listed securities

for its portfolio on registered securities exchanges, but should only buy or sell such listed securities off these exchanges in the so-called "third market". A reasonably early resolution of this far-reaching claim is desired by the Corporation. The possibility of a jury trial and appeal followed by a new trial without a jury would leave this claim open for a longer period than would be the case if the question of the form of trial is reviewed now by this Court before any trial is commenced.

Of the defendants served, Howard L. Clark, Clarence Francis, Donald P. Kircher, John W. Reavis, Charles B. Thornton, B. Earl Puckett, Frazar B. Wilde, Robert A. Bernhard, Lucius D. Clay, Paul L. Davies, Frederick L. Ehrman, Monroe C. Gutman, Robert Lehman, Paul M. Mazur and Alvin W. Pearson are directors or officers of the Corporation. As such, they are entitled to indemnification by the Corporation for expenses incurred by them in connection with the defense of this suit in accordance with the conditions set forth in Section 7 of Article II of the Corporation's by-laws. The text of this Section is as follows:

> SECTION 7. Each person who is or has been a director or officer of the Corporation shall be indemnified by the Corporation against expenses reasonably incurred by him in connection with any claim or in connection with any action, suit or proceeding to which he may be a party, by reason of his being or having been a director or officer of the Corporation. The term expenses includes amounts paid in satisfaction of judgments or in settlement other than amounts paid to the Corporation itself. The Corporation shall not however

indemnify such director or officer if there is a claim of wilful misfeasance, bad faith, gross negligence or reckless disregard of the duties involved in the conduct of his office, unless there is an adjudication of freedom from wilful misfeasance, bad faith, gross negligence or reckless disregard of the duties involved in the conduct of his office, except that in the case of settlement or in the case of an adjudication in which the existence of wilful misfeasance, bad faith, gross negligence or reckless disregard of the duties involved in the conduct of his office, is not established, the Board of Directors shall, prior to authorizing reimbursement for any such settlement or adjudication, determine that the director or officer is not liable to the Corporation or its security-holders for wilful misfeasance, bad faith, gross negligence or reckless disregard of the duties involved in the conduct of his office. Such determination by the Board of Directors, however, shall not prevent a security-holder from challenging such indemnification by appropriate legal proceedings. The foregoing right of indemnification shall be in addition to any other rights to which any such director or officer may be entitled as a matter of law.

Counsel for the Corporation and counsel for both the defendant directors affiliated with Lehman Brothers and counsel for the independent director-defendants have advised us that a jury trial of this case would require greater expenditures for preparation and trial.

The Corporation wishes to minimize the legal expenses of defendants in order to limit the Corporation's potential

obligation to indemnify the defendants for these expenses as provided in the by-laws.

The Corporation therefore opposes a jury trial of this suit and respectfully requests that this Court grant leave to appeal now the order of the District Court permitting this case to be tried by a jury.

s/ JAMES B. DOWNING

Sworn to before me this
18th day of December, 1967.

MILTON C. WINKLER
Notary Public, State of New York
No. 31-9704765
Qualified in New York County
Commission Expires March 30, 1968

Order Dated January 11, 1968

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eleventh day of January, one thousand nine hundred and sixty-eight.

HOWARD ROSS and BERNARD ROSS, as Trustees for Lena Rosenbaum,

Plaintiffs,

v.

ROBERT A. BERNHARD, et al.,

Defendants.

It is hereby ordered that the motion made herein by counsel for the defendants The Lehman Corporation, et al., for leave to appeal under Rule 1292(b) be and it hereby is granted.

/s/ J. EDWARD LUMBARD
/s/ LEONARD P. MOORE
/s/ HENRY J. FRIENDLY
Circuit Judges

January 11, 1968

Notice of Appeal

(97)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

HOWARD ROSS and BERNARD ROSS, as Trustees for Lena Rosenbaum,

Plaintiffs,

—against—

ROBERT A. BERNHARD, et al.,

Defendants.

NOTICE IS HEREBY GIVEN that pursuant to the order of the United States Court of Appeals for the Second Circuit, dated January 11, 1968, granting leave to appeal under 28 U.S.C. 1292(b), defendants The Lehman Corporation, Howard L. Clark, Clarence Francis, Donald P. Kircher, John W. Reavis, Charles B. Thornton, B. Earl Puckett, Frazar B. Wilde, Robert A. Bernhard, Lucius D. Clay, Frederick L. Ehrman, Monre C. Gutman, Robert Lehman, Paul E. Manheim, Paul M. Mazur, Alvin W. Pearson, Joseph A. Thomas, H. J. Szold, Herman H. Kahn, Morris Natelson, Edwin L. Kennedy, Frank J. Manheim, Allan B. Hunter, Marcel A. Palmaro, William H. Osborne, Jr., Arthur D. Schulte and Paul L. Davies hereby appeal to the United States Court of Appeals for the Second Circuit from the order of this Court (McLean, J.) entered herein on December 7, 1967, amending and resettling an order entered November 6, 1967, denying defendants' motion to strike plaintiffs' demand for jury trial and to (98) transfer this case to the Non-Jury Calendar.

Dated: New York, New York
January 15, 1968

Yours, etc.,

SULLIVAN & CROMWELL,

By MARVIN SCHWARTZ
(A Member of the Firm)
Attorneys for Defendants
Clark, Francis, Kircher,
Puckett, Reavis, Thornton and
Wilde,
48 Wall Street,
New York, N. Y. 10005

SIMPSON THACHER & BARTLETT,

By BENJAMIN C. MILNER III
(A Member of the Firm)
Attorneys for Defendants
Robert A. Bernhard, et al.,
120 Broadway,
New York, N. Y. 10005

WALSH & FRISCH,

By E. ROGER FRISCH
(A Member of the Firm)
Attorneys for Defendant
The Lehman Corporation,
250 Park Avenue,
New York, N. Y. 10017

To:

ROSENTHAL & GURKIN,
Attorneys for Plaintiffs,
19 West 44th Street,
New York, N. Y. 10038

POMERANTZ, LEVY, HAUDEK & BLOCK,
Counsel for Plaintiffs,
295 Madison Avenue,
New York, N. Y. 10017

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 6—September Term, 1968

(Argued September 5, 1968 Decided November 1, 1968.)

Docket No. 32118

HOWARD ROSS and BERNARD ROSS, as Trustees for

LENA ROSENBAUM,

Plaintiffs-Appellees,

—v.—

ROBERT A. BERNHARD, *et al.,*

Denfendants-Appellants.

B e f o r e :

LUMBARD, *Chief Judge,*

SMITH and ANDERSON, *Circuit Judges.*

Appeal from an order entered December 6, 1967 by McLean, *J.*, United States District Court for the Southern District of New York, denying defendants' motion to strike plaintiffs' demand for a jury trial, on the ground that the Seventh Amendment to the United States Constitution extends the right to a jury trial to stockholders' derivative actions.

Order reversed and cause remanded.

ROSENTHAL & GURKIN, New York, N. Y. (Pomerantz Levy Haudek & Block, New York, N. Y., Abraham L. Pomerantz and Richard M. Meyer, on the brief), *for Plaintiffs-Appellees.*

SULLIVAN & CROMWELL, New York, N. Y. (Marvin Schwartz and Cornelius B. Prior, Jr., on the brief), *for Defendants-Appellants, Clark, Francis, Kircher, Puckett, Reavis, Thornton and Wilde.*

SIMPSON THACHER & BARTLETT, New York, N. Y. (William J. Manning and Lawrence M. Mc Kenna, on the brief), *for Defendants-Appellants, Robert A. Bernhard, et al.*

WALSH & FRISCH, New York, N. Y. (E. Roger Frisch, on the brief), *for Defendant-Appellant, The Lehman Corporation.*

LUMBARD, *Chief Judge*:

This appeal, taken by permission, questions a district court ruling which would allow a jury trial of a stockholders' derivative action. The defendants in this diversity action appeal from a Southern District order entered November 6, 1967 denying their motion to strike plaintiffs' demand for a jury trial. On December 6, 1967, Judge McLean granted defendants' motion to resettle his order, finding that it involved "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may

materially advance the ultimate termination of this litigation." As there is a difference of views in the district court on this question, see *Richland* v. *Crandall*, 259 F. Supp. 274 (S. D. N. Y. 1966), we thereafter permitted an interlocutory appeal to be taken pursuant to 28 U. S. C. § 1292(b).

We hold that the right to a jury trial guaranteed by the Seventh Amendment to the United States Constitution does not extend to stockholders' derivative actions. Accordingly, we reverse the order of the district court.

This derivative action was brought under the Investment Company Act of 1940, 15 U. S. C. § §80a-1, et seq. Named as defendants are the Lehman Corporation, the investment company for whose benefit the suit is brought, various directors and officers of the corporation, and various partners of Lehman Brothers, an investment banking firm which acts as the investment advisor and principal broker for the corporation. Plaintiffs, stockholders of the Lehman Corporation, pray for a judgment requiring defendants to account for, and pay to the corporation, their profits and gains and its losses resulting from illegal and excessive brokerage commissions paid to Lehman Brothers. These commissions fall in three categories:

> 1) Commissions paid for carrying out transactions for the corporation on the New York Stock Exchange, despite the fact that these transactions could have been executed on the so-called "Third Market" at favorable net prices without the payment of any commissions, or executed other than on a national securities exchange with the payment of substantially smaller commissions than were paid to Lehman Brothers.

2) Commissions paid in connection with over-the-counter transactions in unlisted stocks, despite the fact that the corporation could have conducted these transactions directly with "market makers" and thus avoided paying any commissions.

3) "Reciprocal brokerage commissions" paid by the corporation for allocation to the brokers who provide investment advice to Lehman Brothers, which commissions constitute excessive compensation to Lehman Brothers under its investment advisory contract with the corporation.

The complaint further alleges that more than half of the corporations directors are affiliated with Lehman Brothers, in violation of §10(b)(1) of the Investment Company Act, 15 U. S. C. §80a-10(b)(1). The payments are alleged to constitute "an unlawful and willful conversion" by defendant partners of Lehman Brothers of the corporation's assets, and "gross abuse of trust, gross misconduct, willful misfeasance, bad faith, gross negligence and a reckless disregard of their fiduciary duties" by the defendant officers, directors and brokers of the corporation.

The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Judge McLean held that the question of whether the Seventh Amendment required this action to be tried before a jury, upon plaintiffs' demand, depended upon the nature of the corporate claim asserted derivatively by the stockholders; the Seventh Amendment was to be applied as if the corporation itself were suing. He further found that the corporate claim in this action was legal, rather than equitable, in character, being in essence a demand for a money judgment to recover the funds of the corporation converted by defendants. Thus the right to a jury trial attached to this derivative action.

Our disagreement with the court below stems from the teaching of history that the stockholder's derivative action has always been regarded as exclusively a creature of equity to which the right to a jury trial does not apply. The one previous dissent from this view, *DePinto* v. *Provident Security Life Ins. Co.*, 323 F. 2d 826 (9th Cir. 1963), *cert. denied* 376 U. S. 950 (1964), we do not find persuasive. Because of our view of the jury trial issue we have no occasion to address the question of whether the underlying corporate claim is legal or equitable in character.

In determining whether the constitutional right to a jury trial applies to a given action, the basic inquiry to be made is an historical one: At the time the Seventh Amendment was adopted was the action recognized as a "suit at Common law," as to which the right to a jury trial was to be "preserved." *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, 657 (1935). Despite the merger of law and equity accomplished by the Federal Rules of Civil Procedure the right to a jury trial still applies only to actions which historically could have been brought at law. Rule 38(a), Fed.

R. Civ. P., preserves the right to a jury trial "as declared by the Seventh Amendment to the Constitution . . . " While the Supreme Court seems to have modified this historical test somewhat to take account of the precedural reforms effectuated by the Federal Rules, *Beacon Theatres* v. *Westover,* 359 U. S. 500, 508-11 (1959), for reasons stated below we do not believe that this modification affects the outcome of this case.

The authorities are agreed that the stockholders' derivative action did not evolve until well after the adoption of the Seventh Amendment in 1791. *See,* e.g., Prunty, *The Shareholders' Derivative Suit: Notes on Its Derivation,* 32 N. Y. U. L. Rev. 980, 981, 986 (1957). This fact does not, as defendants suggest, foreclose the possibility that derivative actions fall within the scope of the Seventh Amendment. In instances where either Congress or the courts have evolved a new remedy subsequent to the adoption of the Amendment it is to be analogized to its nearest historical counterpart, at law or equity, for the purposes of determining whether a right to jury trial exists. *See* 5 Moore, Federal Practice ¶38.11[7], at 125 (2nd ed. 1968); James, *Right to a Jury Trial in Civil Actions,* 72 Yale L. J. 654, 655 (1963). No tortuous process of historical analogy is required in this case, however, for it is clear that the derivative action was an invention of equity.

At law stockholders could not bring a suit in the corporation's name for the vindication of a corporate right because, apparently, such legal standing was regarded as incompatible with the limited liability for the corporation's debts enjoyed at law by the stockholders. Note, *The Right to a Jury Trial in a Stockholder's Derivative Action,* 74

Yale, L. J. 725, 729 (1965). Beginning early in the Nineteenth Century equity began to recognize the derivative action, initially in order to provide a remedy against alleged wrongdoers to the corporation who also controlled its management and consequently refused to allow a suit by the corporation against themselves. *Taylor* v. *Miami Exporting Co.*, 5 Ohio 162 (1831); *Robinson* v. *Smith*, 3 Paige Ch. *222, *233 (N. Y. 1832) (dictum); *see* generally *Koster* v. *Lumbermens Mut. Co.*, 330 U. S. 518, 522 (1947). The remedy soon was extended to instances where the stockholders were seeking to enforce a corporate right against an outsider. *Dodge* v. *Woolsey*, 59 U. S. (18 How.) 331, 341-44 (1855); cf. *Forbes* v. *Whitlock*, 3 Ed. Ch. 446 (N. Y. 1841).

From these early suits to the present day the equitable nature of the derivative action has not been disputed. See *Dodge* v. *Woolsey*, 59 U. S. (18 How.) 331, 341 (1855); *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 548 (1949). Likewise, with the sole exception of the *DePinto* decision, *supra*, there has been no significant dissent from the conclusion that the equitable nature of the action excludes it from the purview of the Seventh Amendment's jury trial guarantee. E.g., *Richland* v. *Crandall*, 259 F. Supp. 274 (S. D. N. Y. 1966); 5 Moore, Federal Practice ¶38.38[4], at 305-06 (2nd ed. 1968); 2 Hornstein, Corporation Law and Practice, ¶730 (1959); 13 Fletcher, Private Corporations, §5931 (Rev. ed. 1961); Note, *The Right to a Jury Trial in a Stockholder's Derivative Action*, 74 Yale L. J. 725, 732 n. 35 (1965) (citations to state court decisions under constitutional provisions similar to Seventh Amendment).

The court below, despite this impressive authority against the right to jury trial in derivative actions, reached a contrary result. It pointed out that a derivative action is composed of two distinct claims: 1) the stockholders' claim against the corporation for its refusal to sue in its own name, and 2) the underlying claim put forward for the corporation's benefit. The court held that while it must rule on the equitable issue of the stockholders' right to sue in the corporation's stead, there is no reason to refuse a demand for a jury trial on the underlying corporate claim if it is legal in character.

Other than the *DePinto* case the only supporting authorities cited by the court for its conclusion are *Fleitman* v. *Welsbach Street Lighting Co.*, 240 U. S. 27 (1916), and *Fanchon & Marco, Inc.* v. *Paramount Pictures, Inc.*, 202 F. 2d 731 (2d Cir. 1953). Both suits concerned derivative suits seeking treble damages under the Sherman Act. In the brief *Fleitman* opinion by Justice Holmes the court held that a derivative action would not lie, and for a reason which provides analogous support for defendants in this case. Justice Holmes pointed out that there could be no right to a jury trial in the equitable derivative action. Since he read the Sherman Act as requiring that treble damage actions be tried before a jury the Justice concluded that the derivative action could not be maintained.

Judge Clark's opinion in *Fanchon & Marco* did hint, entirely as dictum, that a jury trial could be demanded by a stockholder suing derivatively for treble damages. Since the jury trial issue does not appear to have been directly presented to the court we do not regard *Fanchon & Marco* as persuasive authority on this point. Moreover, whatever

was said in that opinion relates only to the *statutory* right to jury trial created by the Sherman Act, a fact made clear by the court's reliance on *Fleitman*. We deal here with the constitutional right to a jury trial. The accommodation suggested in *Fanchon & Marco* between the Sherman Act's requirement of a jury trial and the equitable nature of derivative actions is not relevant to our case, where no statutory right exists.[1]

On appeal plaintiffs urge the relevance of two Supreme Court cases construing the Seventh Amendment, *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500 (1959), and *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469 (1962). Neither case is in point.

In *Beacon Theatres* the plaintiff, a theatre operator, alleged that he was being damaged by defendant's threat to file a treble damage action under the antitrust laws challenging the legality of plaintiff's exclusive "first run" contracts with motion picture distributors. Plaintiff sought an injunction against the threatened suit and a declaration that the contracts did not violate the antitrust laws. Defendant counterclaimed for treble damages on the ground that the contracts were illegal.

The Supreme Court noted that both the plaintiff's suit and the defendant's counterclaim revolved around the exact same issue: Were plaintiff's contracts in violation of the antitrust laws? The question, then, was whether plaintiff, by bringing a declaratory action for injunctive relief before

[1] Plaintiffs on appeal make a fleeting argument in their brief that the Investment Company Act should be read as creating a statutory right to a jury trial. Brief for plaintiffs, p. 5. This question was not raised in the court below; and the record before us is not sufficient to enable this court to address the issue.

defendant could bring his law action for treble damages, thereby could deprive defendant of his right to have the antitrust issue tried before a jury. It was no surprise that the court said no; the common issue on which both the equitable and legal relief depended must be tried on the law side in order that the right to jury trial not be defeated altogether. *See* 359 U. S. at 504; James, *Right to a Jury Trial in Civil Actions*, 72 Yale L. J. 655, 687-90 (1963).

We have no such "race to the courthouse" situation in our case. Plaintiffs have lost no right to a jury trial they would have possessed had this issue been litigated at law; were it not for equity, plaintiffs would not be in court at all. In *Beacon Theatres* equity was invoked only to anticipate and defeat the assertion of a legal claim. Here equity grants to plaintiffs their capacity to sue, not merely an alternative form of relief. It is from the fountainhead of equity that this entire litigation flows, and we see no justification for artificially dividing the suit into two parts for the purposes of applying the Seventh Amendment. *See*, Note, *The Right to a Jury Trial in a Stockholder's Derivative Action*, 74 Yale L. J. 725, 729-32 (1965).

In *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469 (1962), the plaintiff sued for trademark infringement and sought both an accounting, which the Court viewed as a claim essentially legal in character, and an injunction. Once again the Court was confronted by two claims for relief which turned on the same issue. If the claim for an injunction were tried first the principle of collateral estoppel would bar a second trial, before a jury, on the legal claim for damages. In these circumstances the court held that the right to a jury trial could not be defeated by labeling the

legal claim "incidental" to the equitable claim and trying the latter claim first; rather the jury trial on the issue of damages must be given priority.

Unlike *Dairy Queen*, the complaint in this case does not merely join two claims which could have been presented in separate suits. Rather, the assertion of any "legal" claim on behalf of the corporation is totally dependent upon plaintiffs' successfully establishing their capacity to sue at equity. Thus in applying the Seventh Amendment the two portions of the complaint cannot be regarded as separable and divisible. Cf. *Robine* v. *Ryan*, 310 F. 2d 797, 798 (2d Cir. 1962).

The Supreme Court in *Beacon Theatres* and *Dairy Queen* did modify the historical test for applying the Seventh Amendment in one respect. The court noted that a prerequisite for equity jurisdiction has always been that no adequate remedy at law exists. One application of this rule concerned the "clean-up" power of an equity court; for the convenience of the parties, and to protect rights which might be jeopardized through the delay which would be caused by requiring an additional suit at law, equity courts whose jurisdiction had been properly invoked by an equitable claim would also dispose of related legal issues. This procedure, which operated to deny a jury trial of those related legal issues, is no longer justified in light of the liberal joinder provisions of the Federal Rules of Civil Procedure. Under the Rules a judge can have the legal issues tried first before a jury, and then immediately decide the equitable issues himself. There is no danger of jeopardizing rights through delay. Thus the court has held that the scope of equitable jurisdiction has declined

pro tanto as the adequacy of legal relief has increased through the procedural reforms of the Federal Rules. *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500, 509 (1959).

This modification of the Seventh Amendment standard does not affect the determination of this case. Equity courts have not exercised jurisdiction over the underlying corporate claims in derivative suits pursuant to their clean-up power, but rather because law has never recognized suits brought by stockholders for their corporation's benefit. The derivative action analytically may be composed of two parts, but before the courts it has always been treated as one, unitary action brought at equity. *See* Note, *The Right to a Jury Trial in a Stockholder's Derivative Action*, 74 Yale L. J. 725, 729-32 (1965).

It is argued that refusing to extend the right to jury trial to derivative actions will cause anomalous results in cases where it is the defendant who demands a jury trial. The plaintiffs point out that while such a defendant would be entitled to a jury trial if the corporation itself brings a legal claim against him, he is, in plaintiffs' words, "cheated out" of his jury if the action is brought derivatively by the stockholders. But if a corporation and its stockholders conspire to have a claim brought derivatively, rather than by the corporation, for the purpose of depriving defendant of a jury trial, his rights can be protected by a remedy less severe than a far-reaching extension of the Seventh Amendment. The refusal of a corporation to sue in its own name in order to avoid a jury trial would violate the spirit of Rule 23.1, Fed. R. Civ. P., and there would be no basis for invoking the jurisdiction of equity to hear a derivative action. Of course no danger of collusion is present in

this case since all defendants are resisting plaintiffs' attempt to secure a jury trial.

As for the anomaly plaintiffs claim to perceive arising from the denial of a jury trial, it has existed since the very origin of the derivative action. We are aware of no great agitation among potential litigants or the bar concerning the traditional rule against jury trials in derivative actions.

It may well be that juries, perhaps with the aid of a master, see *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469, 478 (1963), are perfectly competent to try derivative actions, although we entertain some doubt on this point because of the exceedingly complex nature of many of these actions. But the Seventh Amendment does not ask that we assess the suitability of a given type of litigation for jury trial. In addition to invoking a judicially unmanageable standard, *see* James, *Right to a Jury Trial in Civil Actions*, 72 Yale L. J. 655, 690-91 (1963), such an inquiry would violate the Amendment's instruction that we "preserve," i.e., neither expand nor contract, the constitutional right to a jury trial. After all, there is little practical reason why a jury could not try many suits for injunctions.

The historical test established by the Seventh Amendment may be artificial from a functional point of view. But it satisfies the basic purpose of its drafters of safeguarding from erosion the right to jury trials which existed at the time of its adoption. Applying this test in this case we hold that a stockholders' derivative action is not a "suit at common law" to which the right to jury trial extends.

SMITH, *Circuit Judge* (dissenting):

I dissent. I would affirm the order denying the motion to strike the demand for jury trial. The underlying claim

is essentially "a suit at common law," an action for a money judgment for unlawful conversion, breach of fiduciary duty, fraud and gross negligence. It would have been apt for jury consideration had the corporation itself sued. The issues are not so complex as to be beyond the competence of a trial jury. Cf. *Dairy Queen* v. *Wood*, 369 U. S. 469, 479 (1962). The fact that historically it was necessary for the shareholder to resort to equity in order to step into the corporation's shoes (*Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 548 (1949)), should no longer bar jury trial of the corporate claim. The reason for the denial of jury is eliminated through the provision by the federal rules of one civil action in which the issues of the right of the shareholder to sue and of violation of fiduciary duty causing damage to the corporation may "be tried side by side or otherwise as may be convenient; that one may go to the jury while the other does not cause no difficulty," *Fanchon & Marco* v. *Paramount Pictures*, 202 F. 2d 731, 735 (2d Cir. 1953). I would agree with the result reached by the Ninth Circuit in *DePinto* v. *Provident Security Life Ins. Co.*, 323 F. 2d 826 (9 Cir. 1963), cert. denied 376 U. S. 950, rehearing denied 383 U. S. 973.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of November one thousand nine hundred and sixty-eight.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge.

" J. JOSEPH SMITH,

" ROBERT P. ANDERSON,
Circuit Judges.

HOWARD ROSS and BERNARD ROSS, as Trustees for LENA ROSENBAUM,
Plaintiffs-Appellees,

v.

ROBERT A. BERNHARD, et. al.,
Defendants-Appellants.

Judgment of the Court of Appeals

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

A true copy.

A. Daniel Fusaro
Clerk

Supreme Court of the United States

No. 992 ---- , *October Term, 19* 68

Howard Ross and Bernard Ross, as Trustees for Lena Rosenbaum,

Petitioners,

v.

Robert A. Bernhard et al.

ORDER ALLOWING CERTIORARI. Filed March 24 ---------- , 19 69

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second ---------- Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.